

1993

# Tammy Degrauwe vs. Thomas Vincent Dispenza : Brief of Appellant

Utah Court of Appeals

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COURT OF APPEALS  
STATE OF UTAH

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TAMMY DEGRAUWE,

APPELLANT'S BRIEF

Plaintiff and Appellee,

vs.

Case No. 930144-CA

THOMAS VINCENT DISPENZA

Defendant and Appellant.

Priority No. **4**

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APPEAL FROM AN ORDER SIGNED FEBRUARY 5, 1993 ENTERED AND  
SIGNED BY HONORABLE JUDGE JOHN A. ROKICH IN THE  
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

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**FILED**  
Utah Court of Appeals

JUL 12 1993

  
Mary T. Noonan  
Clerk of the Court

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COURT OF APPEALS  
STATE OF UTAH

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## V. JURISDICTION

The jurisdiction of the Court of Appeals is based upon U.C.A. 78-2a-3(2)(i) pursuant to which the Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over appeals from district court involving domestic relations cases, including but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity.

## VI. ISSUES FOR REVIEW AND THE STANDARD OF REVIEW

The issue presented for review in this case is:

Did the trial court deprive the Appellant, Thomas Vicent Dispenza of his constitutional right to a trial on the merits under the Constitution of the United States, Amendment Five, and Constitution of the United States, Amendment Fourteen and based upon the Constitution of Utah, Article I, Section 7 and Article I, Section 11 by denying him his right to due process of law.

The Standard of Review is the same as though the Lower Court had granted a summary judgement disposing of the issues short of a trial and therefore the Standard of Review is that the appellant is entitled to have all of the facts presented and all the inferences arising there from considered in a light most favorable to them. Morris vs. Farnsworth Motel, 123 U 289, 259 P2nd 297 (1953).

## VII. CONSTITUTIONAL PROVISIONS

The Constitutional Provisions sought to be interpreted are the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, Section 7 of the Utah Constitution which provides:

That no person shall be deprived of life, liberty or property, without due process of law.

and Article I, Section 11 of the Utah Constitution which states:

All courts shall be open, and every person, for and injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administer without denial or unnecessary delay; and no person shall be barred from prosecution or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

## VIII. STATEMENT OF THE CASE

This case involves a dispute over child custody between two unwed parents.

The Appellee, Tammy Degrauwe filed an action in the court seeking custody of the Appellee's and Appellant's minor son. The Appellant counterclaimed and sought the custody of his son. Temporary custody was granted to the Appellee pending a trial on the merits. (Record transcript pages 1 though 3 and pages 17 though 20)

A Trial was scheduled before Judge John Rokich on August 4, 1992. One of the reason the Appellant father was contesting custody was because he claimed he had been consistently denied visitation with his son. He was therefore willing to enter into a trial period to see if he could obtain vistation in view of the admonishment given by the court. At that time a a temporary trial period stipulation was reach with the provision that it would be a



ninety (90) day interim period with a review to be heard by the court to see if the order was complied with by both parties and if it should be adopted as a permanent order. The court was called into session and the interim stipulation was read into the court and agreed to by both parties. A portion of the stipulation read into the court record was that this stipulation would prevail and abide until 90 days from this date, at which time or there about there would be a review hearing. Some the conditions of the stipulation were as follows:

(1) The mother would have temporary custody of the child.

(2) The prior problems with the child visitation by the father would be solved by a strict schedule being set by the court and with a stern admonishment by the court to the mother that the visitation schedule must be followed.

(3) The matter would be reviewed after ninety (90) days as to the compliance of both parties.

(Transcript of the proceedings held on Tuesday August 4, 1992 page 1, lines 16 through 25, pages 2, 3, 4, 5, 6, & 7)

An order was prepared by the Appellant's counsel and sent to the Appellee's counsel for approval. The order was sent back by the Appellee's counsel for redraft and that was done and resubmitted to the Appellee counsel. After a considerable time, in which the Appellee's counsel neither approved nor objected to the order, had expired the Appellant's counsel submitted it to the court for signing. Judge Rokich executed the order on October 15, 1992. (Record transcript pages 190 and 191)

A ninety day review had been scheduled on November 20, 1992 but was continued to November 30, 1992.

On November 5, 1992, a Motion to Set Aside the October 15, 1992 order was made by the Appellee's Counsel.  
(record transcript 192 to 210)

At the November 30, 1992 review hearing the court set aside the October 15th order and made awarded the custody of the child to the Appellee. The Appellant father, who felt that the appellee had violated the agreement wanted to proceed to trial on the merits but was prevented from doing so because the court made an ad hoc ruling granting awarding custody to the mother and there by deprived the father of his due process rights of a trial on the merits. According to the Appellant the trial period arrangements was entirely unsatisfactory and he desired to proceed to court on the child custody issue. It was a complete surprise to both the Appellant and his counsel when the Judge set aside the order and awarded permanent custody to the Appellee and thus depriving the father of a trial on the merits.

#### **IX. SUMMARY OF ARGUMENTS**

1. The Appellant, Thomas Vincent Dispenza was deprived of his constitutional due process rights to hearing on the merits on the issues of custody and child support payments and was deprived of that hearing on the merits by the ruling of the court.

2. The court entered an order providing for a trial period

only of temporary custody in the mother at the end of which time the Appellant, Thomas Vincent Dispenza was entitled to proceed to litigate the issues on the merits if he was dissatisfied on the arrangements.

(1) Mr. Dispenza in good faith endured the trial period of custody in the mother but was consistently denied visitation and elected to prosecute the case to a trial on the merits.

(2) The court then erroneously determined that Mr. Dispenza had entered a final stipulation and waived his rights to a trial on the merits.

(3) The Appellant, Thomas Vincent Dispenza did not waive his rights to a trial on the merits.

(4) The Appellant was denied his due process rights to a trial on the merits under the Constitution of the United States.

(5) The Appellant was denied his due process rights to a trial on the merits under the Utah Constitution.

(6) The Appellant is entitled to a trial on the merits in a domestic relation case.

## **X. ARGUMENT**

### **A.**

The appellant, Thomas Vincent Dispenza was deprived of his constitutional due process rights to a hearing on the merits on the issues of custody and child support payments and was deprived of that hearing on the merits by the ruling of the court.

This is the event of facts which led the Appellant to enter into a stipulation which was to conclude in only ninety (90) days.

This was not a permanent stipulation unless the terms were satisfactory for both parties of this litigation which it did not. As to the facts that this was only a ninety (90) stipulation one must read from the proceedings of the August 4, 1992 hearing and is quoted below from page 1 lines 1 through 19:

Mr. Summerhays: This stipulation will prevail and abide until 90 days from this date, at which time, or there about, we will be given a date by the clerk for an automatic review by the court.

The order that was signed by the Judge Rokich on October 15, 1992 states language as to the temporary state of the order found on page 190 of the record transcript as follows:

The Plaintiff shall have temporary custody of the parties's minor son during the pendency of this ninety day interim order subject to the defendant having reasonable visitation more particularly set forth in the standard schedule of visitation presently recognized by this court and in addition to this said schedule of visitation, the defendant shall have visitation with the minor son every Wednesday from 5:30 p.m. until 8:30 p.m.

On November 30, 1992 Judge Rokich set aside the October 15, 1992 order and made a new order without hearing the facts or issues involved in this case. This constitutes a violation of due process which is a right under both the Constitution of the United States and the Utah Constitution.

#### B.

The court entered an order providing for a trial period only of temporary custody in the mother at the end of which time the Appellant, Thomas Vicent Dispenza was entitled to proceed to litigate the issues on the merits.

As has been previously discussed the stipulation was only prevail and abide for ninety (90) days at which time the court would review and determine if the parties abided by the order and

if it was a workable order. If the order was not working then by the rights of due process the case should have been scheduled for trial again and each side should have the opportunity to present its case. This was never done and the Appellant was denied his constitutional rights.

C.

**Mr. Dispenza in good faith endured the trial period of custody in the mother but was consistently denied visitation and elected to prosecute the case to a trial on the merits.**

During the ninety (90) day interim period there were many problems that arose from the Appellee's live in boyfriend. There were also arguments with the Appellant and Appellee over transportation. These disputes were brought to the attention of the Judge at the proceedings held on November 30, 1992.

Quoting from the transcript of the proceeding page 2 line 25 and page 3 lines 1 through 9 as follows:

Court-- Now, it's my understanding that there has been some problem with regards to visitation; is that correct?

Defendant: Yes.

The Court: and the court is going to make an order that if either party comes back before the court and the court finds that there is a violation of the visitation schedule, that party who has violated the order will be forthwith admitted to the Salt Lake County Jail for two days.

(proceeding transcript of November 30, 1992 page 3 lines 23 through 25 and page 4 line 1)

The court: The one concern, I thought there was an individual living at the house that precludes him from going to the house because they always have words.

The court also had concerns about the visitation problems and made the stern admonishment to both parties at the second hearing. Mr. Dispenza had endured all of the problems with visitation including

denial by the appellee, verbal abuse by the live in boy friend and transportation problems. It was clear that the arrangement had not worked out and when Mr. Dispenza appeared at the second hearing he had decided that it would be best to continue with the trial and seek custody of the child on the merits and facts of the case but was denied this right to due process by the judge's new order.

D.

The court erroneously determined that Mr. Dispenza had entered a final stipulation and waived his rights to a trial on the merits.

It is clear from the transcript of August 4, 1992 that Mr. Dispenza was only stipulation and agreeing to abide to the provisions for ninety (90) days as a test period to seek if the stipulation was feasible. As is shown by the proceeding transcript on page 1 lines 16 through 19 as is quoted below:

Mr. Summerhays: This stipulation will prevail and abide until 90 days from this date, at which time, or there about, we will be given a date by the clerk for an automatic review by the court,

It is clear that Mr. Dispenza did not wave his rights to a trial but merely entered into a ninety (90) day interim period. The court assumed away the rights of the Appellant to his day in court to present the facts in the case.

E.

The Appellant, Thomas Vicent Dispenza did not wave his rights to a trial on the merits.

As has been discussed previously this was only a ninety (90) day interim period to see if the stipulation was feasible. Mr. Dispenza did not wave his rights to due process but was rather

denied these rights by the court. Due process is a right given to all citizens of the United States by Amendments to the Constitution but also given to every resident of the State of Utah through the Utah Constitution.

In the case of Celebrity Club Incorporated vs. Utah Liquor Control Commission, 657 P2nd 1293,1296 the court explained the due process of guaranteed as follows:

Neither a court nor other judicial tribunal may deny a person constitutional rights or deprive such person of a vested interest in property with any opportunity to be heard. To do so constitutes taking of property without due process of law. Many attempt have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court- that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introduction evidence to establish his cause or defense, after which comes judgement upon which thus made.

also see Halling vs. Industrial Commission of Utah, 71 Utah 112, 125, 263 P 78, 82 (1927); Christensen vs. Harris 109 Utah 1, 6, 7, 163 P2nd 314, 315 (1945) and Regans vs. District Court of Salt Lake County, 89 Utah 183,217; 51 P2nd 645, 660 (1935).

F.

The Appellant was denied his due process rights to a trial on the merits under the Utah Constitution Articles I, Sections 7 & 11.

Under the Utah Constitution Article I, Sections 7 & 11 Mr. Dispenza was guaranteed the right to due process but he has been denied this right. The Utah Constitution provides in Article I, Section 7 as follows:

No person shall be deprived life, liberty or property, without due process of law.

The Utah Constitution provides in Article I, Section 11 as

follows:

All courts shall be open, and every person, for an injury to him and his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel in any civil cause in which he is a party.

These rights of due process as described above were denied to the Appellant by order of the court which out a trial on the merits.

G.

The Appellant was denied his due process rights to a trial on the merits under the Fifth and Fourteenth Amendments of the Constitution of the United States.

An opportunity for a hearing before competent and impartial tribunal upon proper notice is one of the essential elements of due process under Amendments Five and Fourteen of the Constitution of the United States as is evidences in the following cases; Armstrong vs. Manzo, 380 US 545, 14 L Ed 2nd 62, 66; Schroeder vs. New York, 371 US 208, 9 L Ed 2nd 255; Shield vs. Utah I.C.R. Co., 105 US 177, 83 L Ed 111; Powell vs. Alabama, 287 US 45, 77 L Ed 158; Blackmer vs. United States, 284 US 421, 76 L Ed 375; Farmers Union Property & Casualty Co. vs. Thompson 4 Utah 2nd 7, 286 P2nd 249; Employees of Utah Fuel Co. vs. Industrial Com of Utah, 99 Utah 88, 104 P2nd 197; Fuller-Toponce Truck Co. vs. Public Service Com., 99 Utah 28, 96 P2nd 722.

The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society as is demonstrated in Wisconsin vs. Constantineau, 400 US 433, 27 L Ed 2d 515. When interests involving liberty and property rights



protected by the Fourteenth Amendment are implicated, the right to some kind of prior hearing is paramount. This point is demonstrated in Board of Regents vs. Roth, 408 US 564, 33 L Ed 2nd 548. In this case the Appellant has been deprived of his rights and the minor child has also been deprived of his constitutional rights to a fair and impartial hearing as to which arrent he will reside. The Appellant is a real party of interest to assert those rights.

All of the cases cited under the previous section as to why the Appellant's rights were violated under the Utah Constitution are apropoe and formulate an addition basis as to why the Appellant was deprived of his rights under the Federal Constitution.

H.

The Appellant is entitled to a trial on the merits in a domestic relation case.

In the Celebrity Club Inc., supra the defendant argued that the Plaintiff's interest in his liquor lease did not constitute "property" within the meaning of the Utah Constitution provisions. The court stated at pages 1296 and 1297 as follows:

Although it is true that the United States Supreme Court once recognized a distinction between "rights" and "privileges" in determining whether to afford due process protection to asserted property rights, that Court has now "sully and finally rejected the wooden distinction between 'right' and 'privileges'" Board of Regents vs. Roth, 408 US 564, 571, 92 S. Ct 2710, 33 L Ed 2nd 548 (1972). In recent cases, the Court has expressed in preference for a more flexible definition of "property" in this contest:

"{P}roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understand."

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be

arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Under a child custody case as is the focus of this case the defendant in a sense is denied something that belongs to him with the process of law of a trial on the merits to determine which parent would be better suited for the child to reside with.

#### XI. CONCLUSION

The Appellant and his son were denied of their constitutional rights to a hearing on the merits. Under the Fifth and Fourteenth Amendments of the Constitution of the United States and under Article I, Sections 7 and 11 of the Utah Constitution it is clear that they did not receive due process as is guaranteed under the constitutions. This case should be remanded back to the lower court for a trial on the merits.

DATED this 12<sup>th</sup> day of July, 1993.


ADAMSON & SUMMERHAYS

  
Lowell V. Summerhays  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT BRIEF to the Appellee's Counsel this 12<sup>th</sup> day of July, 1993 as follows:

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